

SMALL BUSINESS ADMINISTRATION

13 CFR Part 107

RIN: 3245-AG68

Small Business Investment Companies – Early Stage

AGENCY: U.S. Small Business Administration

ACTION: Advance Notice of Proposed Rulemaking (ANPRM)

SUMMARY: The U.S. Small Business Administration (SBA) is seeking input and comments on its Early Stage Small Business Investment Company (SBIC) initiative, promulgated in the final rule on April 27, 2012. The intent of the initiative was to license and provide SBA leverage to SBICs over a 5-year period (fiscal years 2012 through 2016) that would focus on making investments in early stage small businesses. Although 58 investment funds applied to the program, to date SBA has only licensed 5 Early Stage SBICs. SBA is seeking input from the public to determine whether existing market conditions warrant SBA continuing to license Early Stage SBICs past fiscal year 2016 on an ongoing basis and, if so, what changes should be made to the program to attract qualified early stage fund managers.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 3245-AG68, by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Please follow the instructions for submitting comments.
- Mail, Hand Delivery/Courier: Javier Saade, Associate Administrator for the Office of Investment and Innovation, U.S. Small Business Administration, 409 Third Street, SW, Washington, DC 20416.

SBA will post comments on this Advance Notice of Proposed Rulemaking on <http://www.regulations.gov>. If you wish to submit confidential business information (CBI) as defined in the User Notice at <http://www.regulations.gov>, please submit the information to Theresa Jamerson, Office of Investment and Innovation, 409 Third Street, SW, Washington, DC 20416. Highlight the information that you consider to be CBI and explain why you believe this information should be held confidential. SBA will review your information and determine whether it will make the information public.

FOR FURTHER INFORMATION CONTACT: Theresa Jamerson, Office of Investment and Innovation, (202) 205-7563.

SUPPLEMENTARY INFORMATION:

I. Background Information

Early Stage Small Business Investment Company Initiative. In the Small Business Investment Act of 1958 (the Act), Congress created the Small Business Investment Company (SBIC) program to “stimulate and supplement the flow of private equity capital and long-term loan funds which small-business concerns need for the sound financing of their business operations and for their growth, expansion, and modernization, and which are not available in adequate supply” 15 U.S.C. § 661. Congress intended that the program “be carried out in such manner as to insure the

maximum participation of private financing sources.” *Id.* In accordance with that policy, the U.S. Small Business Administration (SBA), through the SBIC program, does not invest directly in small businesses, but provides leverage to SBICs, privately-owned and professionally managed for-profit investment funds licensed by SBA, by guaranteeing the payment of debentures issued by SBICs (Debentures). These SBICs in turn make loans to, and investments in, qualifying small businesses.

Since Fiscal Year (FY) 2000, the SBIC Debenture program has operated at zero subsidy cost, meaning that expected losses to the program’s portfolio must be fully recouped through the collection of SBIC leverage fees in order to keep the program at zero subsidy cost to the taxpayer. By statute, SBIC leverage fees include a 1% commitment fee, a 2% draw fee, and an annual charge set at the time of commitment and paid on outstanding leverage in conjunction with interest payments. 15 U.S.C. 683(i). The annual charge is formulated each year to keep the program at zero subsidy cost, but may not, by statute, exceed 1.38%. 15 U.S.C. 683(b). Because the standard Debenture (Current Pay Debenture) requires semi-annual interest payments, most SBICs structure their investments as loans or mezzanine debt to finance later stage small businesses with positive operating cash flow so that they can meet requisite interest payments.

On April 27, 2012, SBA published a final rule (77 FR 25042) to define a new sub-category of SBICs as part of President Obama’s Start-up America initiative. SBA’s intent was to license over a 5-year period (fiscal years 2012 through 2016) venture funds focused on early stage businesses and to guarantee Debentures in an amount up to one-half of each fund’s total capitalization. SBA allocated \$1 billion of its SBIC Debenture leverage authorization over these years to this effort.

Although SBA has received 58 applications to the Early Stage SBIC program, to date, SBA has only licensed 5 Early Stage SBICs due to the quality of the application pool and SBA's rigorous licensing standards. SBA is seeking input on whether a market need for the program remains and, if so, what changes should SBA consider in order to attract Early Stage fund managers with successful track records.

Early Stage SBIC Key Requirements Summary. Current regulations identify special requirements for Early Stage SBICs to manage the risk associated with these funds investing in seed and early stage businesses, including the following:

(1) Licensing Process - §107.310: SBA uses a call process rather than accepting rolling applications as in the regular SBIC program.

(2) Required Investments - §107.1120(k): Early Stage SBICs must invest at least 50% of aggregate financing dollars into Early Stage companies, as defined in §107.50, but generally defined as companies that have not yet achieved positive operating cash flow as of the date of the initial investment.

(3) Minimum Regulatory Capital - §107.210(3): Early Stage SBICs must have at least \$20 million in Regulatory Capital (qualifying Private Capital as defined in §107.50).

(4) Leverage:

(a) Maximum Leverage - §107.1150: Early Stage SBICs may qualify for leverage up to 100% of Regulatory Capital (also called "one tier of leverage"), not to exceed \$50 million.

(b) SBA Leverage Fees - §107.1130: All SBICs issuing Debentures, including Early Stage SBICs, must pay 3% in up-front fees (1% at commitment and 2% at draw)

and an additional SBA fee, not to exceed 1.38 percent per annum, on outstanding Debentures paid at the same time as interest.

(c) Type of Leverage: Early Stage SBICs may choose from two types of leverage both with ten year maturities and subject to Early Stage Distribution rules:

(i) Early Stage Current Pay Debenture: Requires quarterly payments for interest and SBA annual fees. Early Stage SBICs choosing to use the Current Pay Debenture are required to maintain a 5-year interest reserve per §107.1181. The interest reserve may include unfunded commitments or cash reserves which could be funded from Debenture proceeds. The interest reserve is intended to provide a pool of funds from which Early Stage SBICs can pay interest and annual fees while their investments mature.

(ii) Discounted/Accruing Debenture: Debenture issued at a discount of 5 years of annual fees and interest charges, so that the amount owed accrues over a 5-year period to face value. After the 5-year period, quarterly payments for interest and annual fees must be paid on an ongoing basis.

(5) Distribution Rules - §107.1180: Before an Early Stage SBIC with outstanding leverage may distribute to its investors, it must first pay all required SBA interest and charges and any leverage principal due at maturity. After those payments are made, if the Early Stage SBIC's capital impairment percentage, defined in §107.1840, is 50 percent or more, and the SBIC's leverage ratio (defined as outstanding leverage to Leverageable Capital) exceeds 0.5, it must repay all outstanding SBIC Debentures before distributing to private investors. Otherwise, the Early Stage SBIC must repay SBA leverage, at a

minimum, pro rata (in proportion) with any distributions returned to private investors on a cumulative basis.

(6) Restrictions on Third Party Debt - §107.565: Early Stage SBICs must seek SBA's prior written approval before incurring any third-party debt, except for accounts payable from routine business operations.

(7) Capital Impairment Percentage (CIP) §§107.1830-1850: CIP is the primary financial metric SBA uses to evaluate an SBIC's ability to repay its leverage. CIP measures the losses incurred by an SBIC relative to its Regulatory Capital. If an SBIC exceeds its maximum allowable CIP, SBA has the right to, among other things, declare the entire indebtedness of the SBIC's Debentures immediately due and payable; and institute proceedings for the appointment of SBA as receiver of the SBIC. Because Early Stage SBICs are limited to one tier of leverage, the maximum allowable CIP ranges from 45% to 70%, depending on the percentage of equity. If the percentage of equity investments at cost exceeds 67%, the maximum allowable CIP would be 70%.

II. Market Gap

(1) Market Need. According to data from PricewaterhouseCoopers Moneytree (<https://www.pwcmoneytree.com/>), financings to seed and early stage companies by venture funds has grown from \$2.16 billion in the first quarter of calendar year 2012 to over \$4 billion in the second quarter of calendar year 2014, the highest amount in any quarter since 2000. As a federal credit program, SBA seeks to direct capital to gaps in the marketplace. Given the growth in early stage financings since 2012, SBA is trying to determine whether it should continue to license Early Stage SBICs past 2016. SBA is seeking input from the public with regard to the following questions:

(a) Are there barriers preventing promising early stage small businesses from being financed, and, if so, what are the barriers?

(b) Are there gaps in the financial markets with regard to financing early stage or seed companies in the United States? If so, what evidence exists to identify and verify these gaps?

(c) If there are no or limited gaps in the financial markets for early stage and seed companies in the United States, should SBA continue the Early Stage SBIC program past 2016, but issue a call for Early Stage SBIC applications only if and when identifiable market gaps occur? If so, what evidence should SBA use to identify declining market conditions or gaps in the market?

(2) Targeted Early Stage SBIC Participants. The Early Stage SBIC initiative focused on more established and traditional early stage venture funds to participate in the program because these funds' investment strategy effectively utilizes SBA's leverage to finance small businesses. SBA recognizes that many early stage and seed businesses may obtain capital from other sources than traditional early stage/seed venture funds. Accelerator funds, incubators, angel investment funds or other types of similar funds – venture capital funds that generally make a substantial number of relatively small-dollar equity investments in seed and early stage businesses – have not demonstrated significant interest in SBA's Early Stage SBIC initiative. Could these funds effectively utilize Debenture leverage as part of their investment strategy in a way that would not increase the risk profile of the SBIC program. What changes to the Early Stage SBIC program would SBA need to make in order to attract qualified funds that use this investment strategy? Would the minimum regulatory capital need to be changed? Would the

leverage terms need to be changed? What data is available to assess the risk associated with these types of funds?

III. Early Stage SBIC Program Structure

(1) Fund-Level Debt Versus Equity. Based on discussions with early stage fund managers and limited partners, SBA understands that most early stage funds would prefer equity rather than fund-level debt. However, SBA is only authorized to guarantee SBIC Debentures for its licensed funds. SBA also recognizes the potential mismatch between Debenture leverage and early stage portfolio company cash flows. Because most early stage portfolio companies do not have the cash flow to service debt, most early stage financings are structured as equity. SBA tried to compensate for this in the Early Stage SBIC program by implementing a discounted debenture in which leverage is issued at a discount and interest and charges accrue for 5 years before the fund would be required to make payments on a quarterly basis. Alternatively, Early Stage SBICs could use the Current Pay Debenture and pay interest and charges on a quarterly basis using the required interest reserve.

SBA has heard from members of the venture capital industry that many early stage funds are not interested in leverage. SBA seeks input from the public on whether fund-level debt is of use to early stage fund managers or whether concerns exist with regard to current SBIC Early Stage Debenture leverage terms.

(2) Early Stage SBIC Leverage Terms. Early Stage SBICs are expected to have significantly higher losses than regular SBICs, due to the risk associated with their portfolios. SBA structured the Early Stage SBIC program so that it could be run with minimum impact to the regular SBIC Debenture program. This includes limiting the

amount of Early Stage leverage as a percentage of the overall SBIC portfolio. Key Early Stage SBIC requirements are summarized in Section I of this ANPRM. SBA seeks input from the public to identify how Early Stage SBIC requirements could be improved without increasing SBA's credit risk. In particular, SBA has the following questions:

(a) Minimum Regulatory Capital: Currently, Early Stage SBICs must have at least \$20 million in Regulatory Capital. Should SBA modify this Regulatory Capital requirement in order to improve the number of qualified applicants to the program?

(b) Maximum Leverage: SBA set the maximum leverage for Early Stage SBICs at \$50 million based on its overall allocation of \$200 million per year, in order to provide some level of portfolio diversification. Should SBA increase the maximum leverage available to Early Stage SBICs, for example, to \$100 million, approximately half of any year's allocation?

(c) Maximum Leverage Ratio: Currently, SBA provides up to one tier of leverage, not to exceed the maximum, in order to limit its credit risk. Should SBA lower the maximum leverage ratio to help further reduce its credit risk? What maximum leverage ratio is appropriate?

(d) Interest Reserve: If Early Stage SBICs use the Current Pay Debenture, they must maintain a 5-year interest reserve to make interest and annual charge payments. SBA set this interest reserve to make sure that Early Stage SBICs would have sufficient funds to make required interest payments for the first 5 years and to lower the overall loss rate. Would removing the interest reserve attract more qualified applicants? If so, since the interest reserve was put in place to mitigate SBA's risk and limit the increase to the

SBIC Debenture annual charge, what actions should SBA consider to help mitigate SBA's risk?

(3) Other Early Stage SBIC Regulations. SBA invites comments on other aspects of Early Stage regulations, including the following:

(a) Licensing Process: Would a rolling licensing process (where SBA accepts applications throughout the year) versus the Early Stage Call process, identified in §107.310, be preferred and/or attract more qualified applicants to the program?

(b) Third Party Debt: Do third-party debt restrictions identified in §107.565 detract from the program and what changes could be made to achieve the same credit risks for SBA?

(4) Other SBIC Regulations and Guidelines. SBA also invites comments on other SBIC regulatory requirements as identified in 13 CFR Part 107 that may be of particular concern to Early Stage SBIC applicants. For example, some Early Stage SBICs and potential applicants have indicated concerns with SBA's Valuation Guidelines (<http://www.sba.gov/content/valuation-guidelines-sbics>). SBA is interested in feedback as to what those concerns are and what changes industry members would recommend.

Dated: March 11, 2015

Maria Contreras-Sweet,
Administrator.

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